SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1969
No. .....

BURTON MARKS,

Petitioner,

vs.

THE CHIEF OF POLICE OF THE CITY OF LOS ANGELES, and THE CITY OF LOS ANGELES,

Respondents.

On Appeal From the California Court of Appeal, Second Appellate District.

MOTION TO AFFIRM JUDGMENT OR DISMISS THIS APPEAL.

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BURTON MARKS,

Petitioner,

vs.

THE CHIEF OF POLICE OF THE CITY OF LOS ANGELES, and THE CITY OF LOS ANGELES,

Respondents.

On Appeal From the California Court of Appeal, Second Appellate District.

MOTION TO AFFIRM JUDGMENT OR DISMISS THIS APPEAL.

The Respondents, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the judgment of the Superior Court of the State of California for the County of Los Angeles, rendered and entered on April 15, 1968, be affirmed, or that the appeal taken therefrom to this Court be dismissed on the ground that the federal question sought to be reviewed was not expressly passed on, and upon the further ground that the judgment appealed from rests on an adequate nonfederal basis, and finally upon the ground that it is manifest that the questions on which the decision of the cause depends, are so unsubstantial as not to need further argument.

Statement of Facts.

The following statement of facts is based upon the factual statement of the California Court of Appeal, Second District set forth in its opinion [Appendix "B" *infra*] (which must be accepted as true, since the Petitioner herein in filing his petition for rehearing before that Court under Rule 28(b) of the Rules on Appeal and adopted by the Judicial Council of the State of California, never requested a correction of the record to that Court before filing his petition for hearing in the California Supreme Court).

The Petitioner, an attorney at law, and assignee of Barbara Williams, commenced proceedings in this matter by filing an action for claim and delivery in the Superior Court of the State of California for the County of Los Angeles to recover the sum of $12,020.00, held by the Chief of Police of the City of Los Angeles.

Barbara Williams was interested in assisting Vine Stevens, Catherine Adams, and Nikki Williams, who were being prosecuted, or in danger of being prosecuted for various crimes, and further in securing the arrest and prosecution of Miller Gore and Nido Lee. In this connection, Miss Williams paid various sums of money totalling $12,020.00 to Officer Dahl Pitney, a police officer for the City of Los Angeles.

The Dates and Purposes of Such Payments Are as Follows:

"(a) August 4, 1965, $220 as partial payment of $500 for obtaining a continuance in a sentencing matter of Vine Stevens ($20 of this sum was to reimburse Officer Pitney for long distance telephone calls).

"(b) August 26, 1965, $3,300, of which $1,500, or so much thereof as Franey decided was needed to be used as restitution to the victim of a bunco scheme perpetrated by Catherine Adams in order to stop the prosecution of said Catherine Adams, Officer Franey to keep any balance of said $1,500 for himself; and $1,000 for Officer Franey to use to 'fix' the case against Catherine Adams, that is to fix the case so it wouldn't be prosecuted.

"(c) August 26, 1965, $300 as the balance of $500 promised Officer Franey for obtaining a continuance for the sentencing of Vine Stevens.

August 26, 1965, $500 to arrest Miller Guy and Nido Lee.

"(d) September 27, 1965, $8,500 of which $6,500 was "to take care of it so Cathy (Catherine Adams) won't be prosecuted' and a warrant for Keki Williams be withheld or withdrawn on a charge which Officer Franey had previously annulled. Officer Franey was to use part or all or more of this sum as restitution to the victim and to keep any balance for himself; and the sum of $2,000 as payment to Officer Franey for not prosecuting either Catherine Adams or Keki Williams."

As a result of such payments criminal charges of Bribery, a violation of Section 67 of the Penal Code of the State of California were filed against Barbara Williams, and subsequent thereto she pled guilty to said charges.

is frivolous or taken solely for the purpose of delay or where any party shall have required in the typewritten or printed record on appeal the inclusion of any matter not reasonably material to the determination of the appeal, or has been guilty of any other unreasonable infraction of the rules governing appeals, the reviewing court may impose upon offending attorneys or parties such penalties, including the withholding or imposing of costs as the circumstances of the case and the discouragement of like conduct in the future may require," was based upon Section 75(e) of the Federal Rules of Civil Procedure. (Formerly codified in scattered sections of 28 U.S.C.A., now covered under the Federal Rules of Appellate Procedure, 28 U.S.C.A.).

Witkin, *Costs on Appeal*, 17 So. Cal. L.R. 256, 259 (1944);

Deering's, *California Rules of Court*, 26(a) 232, 233 and n.(a) (1968);

23 West, *Court Rules*, 26(a) 319, 320 and n.(a) (1964).

Rules of Court and Appellate procedure from other jurisdictions employing the language "frivolous appeal" as used in California Rule of Court 26(a), has been judicially condoned by the United States Supreme Court. *Dunscombe v. Sayle* (5th Cir. 1965), 340 F. 2d 311, *cert. den.* 382 U.S. 814, 86 S. Ct. 32, 15 L. Ed. 2d 62 (1965); *Lowe v. Willacy* (9th Cir. 1956), 239 F. 2d 179; *Griffin Wellpoint Corp. v. Munro-Langstroth, Inc.* (1st Cir. 1959), 269 F. 2d 64; *Ginsburg v. Stern* (3rd Cir. 1961), 295 F. 698.

The cases of *Dunscombe v. Sayle, Lowe v. Willacy, Griffin v. Wellpoint* and *Ginsburg v. Stern, supra,* in-

volved the subject of penalties for frivolous appeals under Federal Rule of Appellate Procedure 38, drawn under authority of 28 U.S.C. Section 2072, as amended by the act of November 6, 1966, 80 Stat. 1223 effective July 1, 1968 by order of the Supreme Court, dated December 4, 1967, which provides:

> "If a court of appeal shall determine that an appeal is frivolous, it may award just damages and single or double costs of the appellee."

Similarly, it has been held that Title 28 U.S.C.A. Section 1912 confers power upon the United States Supreme Court and Court of Appeals to impose double costs to prevent frivolous appeals. *Armory v. Armory* (N.Y. 1876), 91 U.S. 356; 1 Otto 356; 236 L. Ed. 436.

Equally unavailing is the Petitioner's last contention that the imposition of a "penalty" under California Rules of Court 26(a) is impermissible due to vagueness of the term "frivolous appeal," for in most jurisdictions throughout the United States, it is uniformly held that the reviewing court may assess a penalty or damage on a finding that the appeal was frivolous or for the purpose of hindering or delaying. 5 Am. Jur. 2d Section 1024; *Southern R. Co. v. Gadd*, 233 U.S. 572; 58 L. Ed. 1099; 34 S. Ct. 696; *Massachusetts Bonding & Ins. Co. v. Fentz* (C.A. 8 Mo.), 182 F. 2d 752; *Stoddart v. Golden*, 179 Cal. 663; 178 Pac. 707; 3 A.L.R. 1060; *Lyons v. Hall* (La. App.), 90 So.2d 519; 60 A.L.R. 2d 1003; *Handy Cafe, Inc. v. Costello Distributing Co.*, 334 Mass. 707; 137 N.E. 2d 218, *cert. den.* 353 U.S. 932; 1 L. Ed. 2d 756; 77 S. Ct. 811; *Mead v. Rudnick*, 306 Mass. 616; 35 N.E. 2d 485; *Greenough v. Greenough*, 354 Mich. 508; 93 N.W. 2d 391; *Maywood v. Logan*, 78 Mich. 135; 43 N.W. 1052;

De Mayo v. Lyons (Mo.), 243 S.W. 2d 967; *Jones-Downes Co. v. Chandler,* 13 N.M. 501; 85 Pac. 392; *Pollard v. Borneman,* 47 S.D. 622; 201 N.W. 525; 36 A.L.R. 954; *Solomon v. Brown Shoe Co.* (Tex. Civ. App.), 50 S.W. 2d 907.

Judicial concern for promoting the orderly and efficient administration of justice by preventing frivolous appeals is no recent judicial invention, for as early as 1879, Chief Justice Waite, speaking of frivolous appeals, in the case of *Whitney v. Cook* (Miss. 1879), 99 U.S. 607; 900 Otto 607; 25 L. Ed. 446 stated at page 446:

> "Our experience teaches us that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages. . . ."

Unquestionably then, through years of common usage and judicial interpretation the words "frivolous" and "frivolous appeals" are neither vague or undefinite, nor can it be cogently argued that the public is uncertain as to a course of conduct required by Rule 26(a), or that Judges are left free to decide without any legal standards what is prohibited and what is not in each particular case. (*Giaccio v. Pennsylvania,* 382 U.S. 399; 15 L. Ed. 2d 447.)

The mandate of Rule 26(a), as applied to the case at bar is simple, and contrary to the contentions of the Petitioner, it does not preclude a judicial review of adversely determined rights, it merely emphasizes a rule of necessity to the orderly administration of justice, to wit:

> Do not urge on appeal that a reasoned decision by the states' highest court is no longer the law, without some supporting authority.

IV.

There Is No Federal Question Involved.

The decision of the Supreme Court of the State of California denying the petition for hearing was based solely on the following state issues:

1. The propriety of the California District Court of Appeal's action in preventing frivolous appeals by the imposition of penalties, pursuant to California Rules of Court 26(a), and

2. The issues as to whether an assignee of a person convicted of bribery is in a position to assert his ownership and right to possession of money actually used in the perpetration of a crime, and whether he may enlist the aid of the courts of California to have such money restored to him.

It is respectfully submitted that these matters are of state concern only and do not involve the federal constitution in any way.

It is well recognized that the decisions of the highest court of the State on matters of state law are generally conclusive upon the Supreme Court of the United States. *Huddelston v. Dwyer,* 322 U.S. 232, 236; *Neblett v. Carpenter,* 305 U.S. 297, 302.

It is peculiar province and privilege of the state courts to construe their own statutes. The power delegated to the United States Supreme Court is for restraint of unconstitutional legislation by the States and not for the correction of alleged errors committed by their judiciary. *Hooker v. Los Angeles,* 188 U.S. 314; 47 L. Ed. 478; *McNulty v. California,* 149 U.S. 645; 37 L. Ed. 882.

It is submitted that the decision of the Supreme Court of California in *Lee On v. Long* (1951), 37 Cal. 2d 499, *cert. den.* 342 U.S. 947; 96 L. Ed. 704; 72 S. Ct. 553, is controlling upon this Court as to all matters passed upon therein. *Neblett v. Carpenter, supra.*

As no federal questions are presented, the Court has no jurisdiction to review the proceedings. 28 U.S.C.A. 1257(3).

Conclusion.

The appeal does not disclose that the highest Court of the State of California has decided a federal question in conflict with applicable decisions of this Court, or that its decision rested upon a necessary federal ground, or that it decided a federal question of substance not therefor determined by this Court.

Respondents urge therefore, that the Petitioner presents no substantial question for decision by this Court; that the judgment sought to be appealed from should be affirmed or the appeal dismissed.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,
Attorney for Respondents.

APPENDIX A.

Amended Complaint for Claim and Delivery.

Superior Court of the State of California, for the County of Los Angeles.

Burton Marks, Plaintiff, vs Thad Brown, Chief of Police of the City of Los Angeles; City of Los Angeles, a municipal corporation; Does II through X, Inclusive, Defendants. No. 898 013.

PLAINTIFF ALLEGES:

I.

The true names or capacities, whether individual, corporate, associate or otherwise, of Defendants named herein as DOES II through X, Inclusive, are unknown to Plaintiff, who therefore sues said Defendants by such fictitious names. Leave of this Court will be sought to amend this Complaint to show their true names and capacities when the same have been ascertained.

II

At all times herein mentioned, the Defendant CITY OF LOS ANGELES, was, and now is, a municipal corporation, organized and existing under and by virtue of the laws of the State of California.

III

At all times herein mentioned, the Defendant THOMAS REDDIN was, and now is, the duly authorized and acting Chief of Police of the City of Los Angeles and the legally appointed successor to the original named Defendant Thad Brown.

IV

Prior to the commencement of this action, Plaintiff was assigned all of the right, title and interest in and to that certain personal property hereinafter described, and Plaintiff, prior to the commencement of this action, was, and now is, entitled to the possession as assignee of said personal property, which property is more particularly described as follows:

1. $220.00 in cash taken from Plaintiff's assignor on August 4, 1965, which sum was taken in connection with and is held and segregated under Los Angeles Police Department DR No. 65-53796.

2. $3,300.00 in cash taken from Plaintiff's assignor on August 26, 1965, which sum was taken in connection with and is held and segregated under Los Angeles Police Department DR No. 65-53796.

3. $8,500.00 in cash taken from Plaintiff's assignor on September 7, 1965, which sum was taken in connection with and is held and segregated under Los Angeles Police Department DR No. 65-53796.

V

On said dates, and thereafter, to and including the present time, Defendants, without the consent of Plaintiff or Plaintiff's assignor, had said property in their possession; defendants still retain possession of said personal property and unjustly claim to be the owner of same.

VI

Defendants unlawfully withhold said property from Plaintiff's possession, to Plaintiff's damage in the sum of $12,020.00.

WHEREFORE, Plaintiff prays judgment against the Defendants and each of them, as follows:

1. For possession of said personal property or its value in said sum of $12,020.00 in case delivery thereof cannot be had.

2. For interest on said sum at the legal rate of 7% per annum from the respective dates on which said personal property was unlawfully obtained;

3. For costs of suit; and

4. For such other and further relief as to the Court seems just and proper.

Harvey A. Schneider
Harvey A. Schneider
Attorney for Plaintiff

APPENDIX B.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

Burton Marks, Plaintiff and Appellant, vs. Thomas Reddin, as Chief of Police of the City of Los Angeles, and the City of Los Angeles, Defendants and Respondents. Civ. No. 33712.

Filed Oct. 23, 1969.

APPEAL from a judgment of the Superior Court, Los Angeles County. Arnold Praeger, Judge. Affirmed.

Judgment for Defendants in a complaint for claim and delivery, affirmed.

Marks, Sherman & London and Burton Marks (in propria persona) for Plaintiff and Appellant.

Roger Arnebergh, City Attorney (Los Angeles), John A. Daly and George J. Franscell, Assistant City Attorneys, and William B. Burge, Deputy City Attorney, for Defendants and Respondents.

Plaintiff, an attorney at law, sues, as the assignee of Barbara Williams, to recover $12,020, held by the Chief of Police of the City of Los Angeles. As disclosed by the pleadings and record, the Defendants came into possession of this sum of money under the following circumstances:

Barbara Williams was interested in assisting Vine Stevens, Catherine Adams and Keki Williams, who were being prosecuted, or who were in danger of being prosecuted, for certain criminal conduct, and to secure the arrest and prosecution of Miller Guy and Nido Lee. In that connection, she paid the total sum of $12,020

to Officer Franey of the Los Angeles Police Department, for the following purposes:

(a) August 4, 1965, $220 as partial payment of $500 for obtaining a continuance in a sentencing matter of Vine Stevens ($20 of this sum was to reimburse Officer Franey for long distance telephone calls).

(b) August 26, 1965, $3,300, of which $1,500, or so much thereof as Franey decided was needed to be used as restitution to the victim of a bunco scheme perpetrated by Catherine Adams in order to stop the prosecution of said Catherine Adams, Officer Franey to keep any balance of said $1,500 for himself; and $1,000 for Officer Franey to use to "fix" the case against Catherine Adams, that is to fix the case so it wouldn't be prosecuted.

(c) August 26, 1965, $300 as the balance of $500 promised Officer Franey for obtaining a continuance for the sentencing of Vine Stevens.

August 26, 1965, $500 to arrest Miller Guy and Nido Lee.

(d) September 27, 1965, $8,500 of which $6,500 was "to take care of it so Cathy (Catherine Adams) won't be prosecuted" and a warrant for Keki Williams be withhheld or withdrawn on a charge which Officer Franey had previously annulled. Officer Franey was to use part or all or more of this sum as restitution to the victim and to keep any balance for himself; and the sum of $2,000 as payment to Officer Franey for not prosecuting either Catherine Adams or Keki Williams.

At all times, Officer Franey was acting in the course and scope of his duties as a police officer with the

knowledge of and under the orders of his superiors; he received the monies in that capacity and without intent to be influenced in any official action; he turned the monies, as received, over to his superiors and they are held by the defendant city in segregated accounts. Barbara Williams has pled guilty to a violation of section 67 of the Penal Code (bribery) in connection with the transactions above set forth.

The trial court entered judgment for defendants on the ground that plaintiff had not filed a claim was required by the Government Code and on the ground that plaintiff was barred from recovery on grounds of public policy. Since we affirm on the latter ground, we need not consider whether or not plaintiff's claim, if otherwise cognizable, falls within the claims statute.

Plaintiff argues as follows:

(1) To permit the city to keep the money is a "forfeiture" prohibited by the Penal Code and by the Constitution.

(2) That even if a bribe was involved, not all the money was tainted by a bribe, and therefore plaintiff was entitled to some of the money.

(3) There was no contract between the police officer and the assignor.

I

Plaintiff's contention that allowing the city to keep the money is a "forfeiture" prohibited by Penal Code Section 2604 is not well taken. The Court in the case of *Lee On v. Long* (1951) 37 Cal.2d 499, stated in part as follows:

> "Consistent with the general rule governing the construction of statutes involving forfeitures (12

Cal.Jur. § 3, pp. 633-634), the trial court properly recognized the limits of its express statutory authority and denied the county's petition for forfeiture 'as far as the money [was] concerned.' (*Cf. Chapman v. Aggeler*, 47 Cal.App.2d 848, 860-861 [119 P. 2d 204].) *However, the present case on appeal does not concern the law of forfeitures, but rather relates to the question of whether plaintiffs, admittedly engaged in illegal gambling activities at the time of the raid and their arrest, are in a position to assert their ownership and right to possession of the money that was then in actual use in such activities, and to enlist the aid of the court in seeking to have it restored to them.*

" 'No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim.' (17 C.J.S. § 272, p. 656.)" (Emphasis added.)

Plaintiff argues that the *Lee On* case is "not the law of this state any longer." Plaintiff cites no case overruling *Lee On*, and our own research has not disclosed any. Nor are plaintiff's attempts to distinguish *Lee On v. Long* from the instant case persuasive. The principles of law are the same whether the facts involved gambling, as in *Lee On*, or a bribe, as in the instant case.

II

Plaintiff next argues that, even assuming some illegal transaction, not all of the transactions were tainted. The rule is that a party to an illegal contract may not successfully invoke judicial aid to have his illegal objects carried out, nor set up a case in which he must necessarily disclose an illegal purpose as a basis for his claim. The test is whether the plaintiff can establish his case otherwise than through the medium of an illegal transaction to which he himself is a party. (*Lee On v. Long, supra* (1951) 37 Cal.2d 499.) Since plaintiff cannot establish his case without raising the illegal transactions, whether or not each and every individual transaction, considered alone and not in the context of a series of transactions, is in itself illegal, does not help plaintiff's case.

Further, it is clear that all the moneys given by Officer Franey were related to illegal transactions. The word "bribe" is defined as follows:

> "The word 'bribe' signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given in his action, vote, or opinion, in any public or official capacity;" (Pen. Code, §7, subd. 6.)

A bribe contemplates a promise to give a public officer anything, which may have a future existence and value, with the intent to unlawfully influence him in his official action. (*People v. Vincilione* (1911) 17 Cal. App. 513, 515.) It is clear that plaintiff's assignor in the case at bench was attempting to unlawfully influence the officer in his official action in each transaction.

Plaintiff argues that some of the money was paid to Officer Franey to be paid by him to the victims of the various fraudulent transactions indulged in by the persons arrested or suspected of such crimes and that reimbursement of victims is a lawful—even a commendable—act and not illegal. But the arrangement was that the officer could keep for himself all monies not needed to satisfy the several victims; as far as the record discloses, the victims might have been satisfied with minimal amounts. It follows that plaintiff cannot segregate any specific sum that was devoted to a lawful purpose, even if he legally could disengage the parts of single payments. Since the record does not disclose the purpose of the telephone calls involved in the August 4th payment, we cannot say that they were not made as part of the over-all bribery scheme.

III

Plaintiff contends that he is entitled to recover because a contract was never formed between Officer Franey and plaintiff's assignor. The court in the *Vollmann* case said: "In this connection it must be remembered that no 'meeting of the minds' is required to establish an agreement to take a bribe." (*People v. Vollmann* (1946) 73 Cal.App.2d 769, 788.) Further, in *Schur v. Johnson* (1934) 2 Cal.App.2d 680, it was held that courts will not lend aid to transactions founded on illegal contracts *or* acts in violation of law. And in *Berka v. Woodward* (1899) 125 Cal. 119, the California court, quoting from an earlier case, said that no court shall lend its aid to a man whose grounds for action are based on an illegal or immoral act.

Thus, the existence or nonexistence of a contract is irrelevant. It is clear that the money was given with a

corrupt intent by plaintiff's assignor to influence official action, and that is sufficient to preclude plaintiff from using the courts to recover money.

The judgment is affirmed. The appeal is strictly frivolous. In addition to the usual costs on appeal, appellant shall pay, to the clerk of this court, the sum of $250 as a penalty for taking a frivolous appeal.

Kingsley, *J.*

We concur:

Jefferson, *Acting P. J.*
Dunn, *J.*

Certified for nonpublication in the Official Reports pursuant to rule 976.

Jefferson, *Acting P. J.*
Kingsley, *J.*
Dunn, *J.*